SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1593

SOCIETE INDUSTRIES MECHANIQUES ALLIES,

Petitioner,

VS.

**HONORABLE OREN R. LEWIS,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION,**

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Record References

Citations to the portions of the record herein certified to this Court by the Court of Appeals for the Fourth Circuit that are in the printed Appendix to this Petition are given as "A" followed by the page number, e.g. "(A-2)".

The "Appendix Accompanying Petition for Writ of Mandamus" of the record hereto which is not printed is separately paged. Citations to that portion of the record are given by "AR" followed by the page number of the Appendix Accompanying Petition for Writ of Mandamus, e.g. "(AR 1)".

IN THE

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OCTOBER TERM, 1970

No.

SOCIETE INDUSTRIES MECHANIQUES ALLIES,

Petitioner,

VS.

**HONORABLE OREN R. LEWIS,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION,**

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Societe Industries Mechaniques Allies (S.I. M.A.), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on January 18, 1971.

OPINIONS BELOW.

The order and opinion entered November 5, 1970 by the United States District Court for the Eastern District of Virginia, Alexandria Division, Lewis, J., in Deering Milliken Research Corporation v. Constantine Vecchioni and Societe Industries Mechaniques Allies, Civil Action 68-70-A have been unofficially reported at 168 U.S.P.Q. 59. The District Court's order entered November 27, 1970 denying petitioner's motion to amend the order of November 5, 1970 to permit an interlocutory appeal has not been reported. Copies of both are printed in the Appendix hereto at pages A-1 - A-4.

The order of the Court of Appeals for the Fourth Circuit denying the petition for a writ of mandamus in Societe Industries Mechaniques Allies v. Honorable Oren R. Lewis, United States District Judge for the Eastern District of Virginia, Alexandria Division, Cause No. 15,383, has not been reported. A copy thereof is printed in the Appendix hereto at p. A-5.

JURISDICTION.

The order of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on January 18, 1971. A petition for rehearing was not filed. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Whether it is a denial of due process of law under the Fifth Amendment to the United States Constitution and the policy of equal benefit of the laws set forth in 42 U.S.C. 1981 to hold that venue of patent infringement actions against citizens is determined solely by the patent venue statute [28 U.S.C. 1400(b)] and not by the general venue statute [28 U.S.C. 1391], while holding that venue of such actions as to aliens is determined solely by the general venue statute.

2. Whether this Court's decisions in *Stonite, Fourco,* and *Schnell**, preclude judicial legislation superseding the patent venue provisions of 28 U.S.C. 1400(b) by the general venue provisions of 28 U.S.C. 1391(d) to confer personal jurisdiction over an alien corporation having no place of business in the United States, no officers or employees in the United States, and having committed no act of infringement in the judicial district where suit is brought.

3. Where a Court of Appeals has sanctioned a District Court decision construing 28 U.S.C. 1400(b) and 28 U.S.C. 1391(d) in a manner conflicting with applicable decisions of this Court and another Court of Appeals, should this Court resolve the conflict by granting certiorari and stating a proper construction of the statutes in question.

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* *Stonite,* 315 U.S. 561 (1942)
Fourco, 353 U.S. 222 (1957)
Schnell, 365 U.S. 260 (1961)

This Court denied certiorari (389 U.S. 859) in *Coulter Electronics, Inc.* v. *A. B. Lars Ljungberg Co.*, 376 F. 2d 743 (7th Cir. 1967), which is the only Court of Appeals decision dealing with patent venue as to aliens. It holds the law to be as petitioner asserts. The Fourth Circuit has likewise acknowledged the broad principle that 28 U.S.C. 1400(b) is not to be supplemented by 28 U.S.C. 1391. Yet the Court below followed two contrary district court decisions and held:

> "Clearly S.I.M.A. [petitioner] is an alien. It is not an inhabitant of any district and may be sued in any district within which process can be served on it. 28 U.S.C. §1391(d)." (A-1)

STATUTES INVOLVED.

28 U.S.C. 1338(a) provides:

> Patents, copyrights, trademarks and unfair competition.
>
> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

28 U.S.C. 1400(b) provides:

> Patents and copyrights.
>
> (b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. 1391(d) provides:

> Venue generally.
>
> (d) An alien may be sued in any district.

STATEMENT OF THE CASE.

Nature of the Action

The case in which this petition arises is the *third* in a series of patent infringement actions commenced by the plaintiff in different judicial circuits. It was brought in the Eastern District of Virginia for the purpose of avoiding the rule of *Coulter Electronics, Inc.* v. *A. B. Lars Ljungberg Co.*, 376 F. 2d 743 (7th Cir. 1967); cert. den. 389 U.S. 859, barring venue and jurisdiction as to petitioner. (AR 138) Plaintiff alleges infringement of unadjudicated United States Letters Patent Nos. 2,830,431 and 2,834,178, entitled "Strand Twisting Machine" and "Strand Handling Machine", respectively. In each of the three cases, the machine accused to be an infringement is a machine made and sold by petitioner in Italy.

The Parties

Petitioner is a corporation organized and existing under the laws of Italy having its principal place of business at Bologna, Italy. It has no office, place of business or property in the United States. (AR 4, 10, 53)

Co-defendant Vecchioni resides at Fairfax, Virginia, having moved from Wood Dale, Illinois on or about June 1, 1969. He is president and director of V. C. Industrial International Company, an Illinois corporation. (AR 32)

Plaintiff is a corporation of South Carolina having its principal place of business at Spartanburg, South Carolina. (AR 4) It holds bare legal title to the Letters Patent, having granted an exclusive license to another who is not a party to the action. (AR 135)

The Proceedings Below

Plaintiff filed the complaint in the Eastern District of Virginia on February 12, 1970, having previously filed suit against a customer in the Central District of California on March 13, 1969 and another suit against defendant Vecchioni in the Northern District of Illinois on November 10, 1969. On July 4, 1970, a copy of the present complaint and an alias summons to petitioner were served on defendant Vecchioni, characterized in the summons as general or managing agent of petitioner. Vecchioni answered and moved for dismissal, transfer or stay of this action in view of the previously commenced action against him in the Northern District of Illinois. The motions of defendant Vecchioni are pending and undecided. (AR 10, 20)

In lieu of filing an answer, petitioner filed a special appearance and moved on July 24, 1970 to quash the service of process and to dismiss the action as to it for lack of jurisdiction over the person and improper venue. The motions of petitioner were denied by the Order of November 5, 1970. (A-1)

In explanation, the District Court followed the decisions in *Olin Mathieson Chemical Corp.* v. *Molins Organization, Ltd.,* 261 F. Supp. 436 (E.D. Va. 1966) nd *Chas. Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici,* 278 F. Supp 148 (S.D. N.Y. 1967) notwithstanding the contrary decision by the Seventh Circuit in *Coulter Electronics,* supra pp. 4, 5.

The District Court further concluded after reciting certain acts of defendant Vecchioni in relation to petitioner:

"Being not only the highest ranking but the only person in the United States to handle S.I.M.A.'s business in the United States, this Court is of the opinion that service of process on Vecchioni as the agent of S.I.M.A. constitutes legal service on S.I.M.A. in this District." (A-2)

On November 13, 1970, petitioner moved the District Court to amend the Order to include a certificate under 28 U.S.C. 1292(b) to permit an application for an interlocutory appeal to the Court of Appeals for the Fourth Circuit. The District Court denied this motion on November 27, 1970. (A-4)

On December 14, 1970, pursuant to 28 U.S.C. 1651, petitioner filed a petition for writ of mandamus in the Court of Appeals for the Fourth Circuit directing that the District Court vacate the Order of November 5, 1970, quash service of process on petitioner, and dismiss the action as to petitioner for lack of jurisdiction and improper venue. The Court of Appeals entered an Order on December 18, 1970 directing plaintiff to answer the petition. Plaintiff filed an answer on January 11, 1971. On January 18, 1971, the Court of Appeals entered an order denying the petition. (A-5)

Relation of Petitioner's Business to Defendant Vecchioni

Petitioner S.I.M.A. makes and sells in Italy various types of machines for the textile industry, such as twisters and winders, for making yarns, cords and rope. (AR 33) One of these machines known as a T2T/R twister-winder is accused in the complaint as being an infringement of plaintiff's two Letters Patent. Specifically, petitioner is charged with "selling its Model T2T/R

Twister-Winder machines through its agent, the said defendant Vecchioni". (AR 67) No such machine had been purchased by a U.S. company for over a year and a half prior to commencement of this action. (AR 66)

Petitioner has twice displayed its machines in the United States, at textile trade shows in 1965 and 1967. Orders were taken for machines at the two shows, but none for the accused machines. Neither show was in Virginia and no machines had been displayed by petitioner anywhere in the United States for two and a half years prior to commencement of this action. (AR 34)

Except for the orders for machines given to petitioner at the 1965 and 1967 trade shows, all orders are sent to Italy where they are accepted or rejected by petitioner. The machines are there made, invoiced and shipped to the United States and elsewhere around the world. (AR 34, 43, 67, 69, 70)

Companies in the United States wishing to purchase machines of the type sold by petitioner S.I.M.A. learn of its machines primarily from European trade shows or by literature direct from Italy. (AR 34, 74-75, 85, 96, 97)

Requests for information concerning petitioner's machines are forwarded to Italy where a quotation including price, delivery and terms of payment is prepared. If a purchase order from a United States company follows, it is acknowledged and accepted or rejected in Italy by direct correspondence with the prospective purchaser. Thereafter, the machine, if the order is accepted, is invoiced and shipped from Italy. (AR 33, 34, 104-107)

The V. C. Industrial International Corporation of which defendant Vecchioni is the president and sole employee,

had its principal place of business in Chicago, Illinois until February, 1970, when it obtained a forwarding address at Burke, Virginia, following the move of defendant Vecchioni to that state. (AR 32) The principal business of the corporation was buying and selling equipment for use in the molding of plastic materials and is unrelated to petitioner. (AR 33)

Since about 1965 and 1966, the Illinois corporation has provided, and still provides, a mail address and telephone answering service for petitioner S.I.M.A. As the only active officer and employee of the Illinois corporation, and not individually, defendant Vecchioni has functioned and still functions as a communication and translation service for messages transmitted to and from S.I.M.A. and companies or persons in the United States. (AR 33)

The compensation for such services is paid by petitioner S.I.M.A. to the Illinois corporation and comprises a commission based on a percentage of the sales price of machines shipped to the United States by S.I.M.A. The gross commission is about ten percent which netted five or six percent after paying expenses. (AR 34)

Neither defendant Vecchioni nor the Illinois corporation:

(1) Solicits the sale of S.I.M.A. machines,

(2) Collects money due S.I.M.A.,

(3) Operates, controls, manages or has possession of any office or property of S.I.M.A.,

(4) Makes any contracts, agreements or sales for S.I.M.A.,

(5) Conducts any advertising for S.I.M.A.

Neither of them has done so in the past. (AR 34, 35)

Petitioner S.I.M.A. has not at any time authorized defendant Vecchioni or said corporations to collect money for it, to manage or operate any office or property for it, to make any sale or purchase for it, to enter into any agreement for it, to receive service of process for it, or to make any binding representation for it other than the retyping of a quotation for a machine. (AR 35)

Defendant Vecchioni is not and has not at any time been an employee, officer, or director, nor has he participated in any of its management functions. He has never been a shareholder or the holder of any other proprietary interest in S.I.M.A. He has no contract with S.I.M.A., only an oral understanding that a commission will be paid to the Illinois corporation on machines shipped to the United States. He has never received reimbursement for expenses from S.I.M.A. or ever displayed or listed the S.I.M.A. name. (AR 35, 36)

The major portion of defendant Vecchioni's time is, and for the past several years has been, spent in the buying and selling of molds and equipment for making plastic parts and articles. This activity is not related in any way to S.I.M.A. (AR 33, 53)

REASONS FOR ALLOWANCE OF THE WRIT.

1. Discriminatory Application of the Venue Statutes As Between Citizen and Alien Defendants in Civil Actions for Patent Infringement Is Constitutionally Indefensible.

The District Court decision, as sanctioned by the Fourth Circuit, would limit the applicability of the special patent venue statute [28 U.S.C. 1400(b)] to citizens while excluding aliens. Venue as to all citizen defendants in patent infringement actions would thus be determined by the patent venue statute and not the general statute [28 U.S.C. 1391]. Venue as to alien defendants in the same civil actions would be determined solely by the general venue statute.

The exclusion of aliens from the scope of the special venue statute governing all other defendants in civil actions for patent infringement is repugnant to the concepts of due process and equal benefit of the law. It is well settled that these Constitutional protections extend to aliens as well as citizens. *Galvan* v. *Press,* 347 U.S. 522, 530 (1954); *Takahashi* v. *Fish Comm'n,* 334 U.S. 410, 420 (1948).

2. The Decisions of the Courts Below Are Inconsistent with Applicable Supreme Court Decisions.

This Court held unequivocally in *Stonite Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561, 563-567 (1942) that Section 48 of the Judicial Code (28 U.S.C. 109), derived from the Act of 1897 and later recodified as 28 U.S.C. 1400(b), "is the exclusive provision governing venue in patent

infringement proceedings" and that "Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings."

In its subsequent decision in *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228, 229 (1957), this Court noted that "28 U.S.C. §1400(b) made no substantive change from 28 U.S.C. (1940 ed.) §109 [§48 of the Judicial Code] as it stood and was dealt with in the *Stonite* case". This was reaffirmed in *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961), where this Court declined to enlarge upon the mandate of Congress as to venue in such patent actions because it "would be an intrusion into the legislative field".

If permitted to stand, the decisions of the Courts below would superimpose on 28 U.S.C. 1400(b) an exception as to aliens by a construction of that statute inconsistent with the view expressed so unequivocally by this Court in *Stonite, Fourco* and *Schnell,* supra. It is submitted that, in such circumstances, the grant of certiorari and reversal per curiam would be in order. *Egan* v. *City of Aurora,* 365 U.S. 514 (1961).

3. This Court Should Resolve the Growing Conflict Between Circuits on Patent Venue as to Alien Defendants.

The *Olin Mathieson* decision, supra p. 6, and the concurring decision of the Southern District of New York in *Charles Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici,* 278 F. Supp. 148 (S.D. N.Y., 1967), relied upon by the Courts below, are contrary to the rule expressed by this Court in *Stonite, Fourco* and *Schnell.*

Both *Olin Mathieson* and *Charles Pfizer* would superimpose the general venue statute relating to aliens [28 U.S.C. 1391(d)] as an exception to Section 1400(b). Prior to the instant case, the *Olin Mathieson* decision had not been followed by an appellate court. It was specifically rejected by the Seventh Circuit Court of Appeals in *Coulter Electronics*, supra pp. 4-6.

As a result of these conflicting decisions, the country is being divided into jurisdictions which accord different treatment to alien defendants in civil actions under 28 U.S.C. 1338(a) based on federally granted patent rights. Alien defendants are dismissed out of the Seventh Circuit for lack of venue pursuant to Section 1400(b), e.g. *Raytheon Company* v. *Sanyo Denki KK et al.*, 168 USPQ 422 (N.D. Ill., 1970). On the other hand, alien defendants, petitioner included, who would not be subject to venue under 1400(b) are held in the Fourth and Second Circuits and forced to trial with venue obtained under 1391(d). The availability of appeal on the question after a lengthy patent trial is of conjectural value.

4. The District Court's Assumption of Jurisdiction Over Petitioner Is Neither Fair, Reasonable, Nor Just.

The minimum contacts needed to establish jurisdiction over petitioner are utterly lacking. (AR 33-36) Where as here, the contacts by petitioner with this country have been less than sporadic and no substantial attempt has been made to do business in this country, there is no basis for subjecting petitioner to the difficult and expensive task of conducting patent litigation in this country. Under such circumstances, it is neither fair, reasonable, nor just to make petitioner stand trial in the United States for acts conducted in Italy.

Plaintiff clearly is not without remedy. It already has sued a user in California, and also Vecchioni, accused as the channel through which sales are made. If plaintiff has a cause of action, its only right invaded in any event is use of the machines in this country. That right it has pursued in the California case. If there has been any sale of an accused machine in this country, it will be determined in the action against Vecchioni in Illinois. On the record made, plaintiff can fully protect its rights if it succeeds in the prior actions. Its U.S. patent monopoly is not extraterritorial.

We respectfully submit that when an "'estimate of the inconveniences' which would result to the petitioner from a trial away from its 'home' or principal place of business" is considered, the District Court's assertion of jurisdiction over the petitioner was improper. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

CONCLUSION.

For the reasons above set forth, this petition for writ of certiorari should be granted.

Respectfully submitted,

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April 17, 1971

APPENDIX

IN THE UNITED STATES DISTRICT COURT
For The Eastern District Of Virginia
Alexandria Division

DEERING MILLIKEN RESEARCH CORPORATION,
Plaintiff

v.

CONSTANTINE VECCHIONI and SOCIETE INDUSTRIES MECHANIQUES ALLIES,
Defendants

Civil Action No. 68-70-A

ORDER

The Court is of the opinion that defendant's (hereinafter called SIMA) motion to quash service of process and to dismiss for lack of jurisdiction ought to be denied, and

It Is So Ordered.

Clearly SIMA is an alien. It is not an inhabitant of any district and may be sued in any district within which process can be served on it. 28 U.S.C. § 1391(d).

Jurisdiction and venue in patent infringement cases against aliens are not grounded exclusively on 28 U.S.C. § 1400(b). This Court, speaking through Judge Butzner, so determined in *Olin Mathieson Chemical Corp.* v. *Molins*

Organization, Ltd., 261 F. Supp. 436 (1966). The Southern District of New York, in *Chas. Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici*, 278 F. Supp. 148 (1967), concurred in the views expressed by Judge Butzner notwithstanding a contrary decision by the Seventh Circuit in *Coulter Electronics Co.* v. *A. B. Lars Ljungberg & Co.*, 376 F. 2d 743 (1967). The facts in the *Chas. Pfizer* case are not too unlike those here.

Service on SIMA in this district was had by serving a copy of the summons and complaint upon the co-defendant Vecchioni, the alleged manager or general agent of SIMA. Vecchioni's residence in Virginia is not questioned. His status as SIMA's only representative in this country was clearly established by deposition and affidavit. They show that Vecchioni sold SIMA machines at a trade show in the United States; that he furnished field servicing for these machines; that he transmitted orders to SIMA in Italy for spare parts; that he provided mailing and telephone answering service for SIMA; and that he received commissions for all SIMA machines sold in the United States.

Being not only the highest ranking but the only person in the United States to handle SIMA's business in the United States, this Court is of the opinion that service of process upon Vecchioni as the agent of SIMA constitutes legal service on SIMA in this district.

SIMA should, therefore, file its answer and grounds of defense to the complaint on or before twenty days from the date of this order, if it has not already so done.

The Clerk will send a copy of this order to all counsel of record.

/s/ Oren R. Lewis
United States District Judge

November 5, 1970

A True Copy, Teste:

W. Farley Powers, Jr., Clerk

By /s/ Betty Dodson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
For The Eastern District Of Virginia
Alexandria Division

DEERING MILLIKEN RESEARCH CORPORATION,
Plaintiff

v.

CONSTANTINE VECCHIONI and SOCIETE INDUSTRIES MECHANIQUES ALLIES,
Defendants

Civil Action
No. 68-70-A

ORDER

This cause having come on to be heard on November 24, 1970, upon the Motion of Defendant, Societe Industries Mechaniques Allies (hereinafter S.I.M.A.) to amend Order of this Court dated November 5, 1970, and upon S.I.M.A.s Motion For Stay and the Court having considered said Motions, and the arguments and statements of counsel;

It is hereby ordered:

1. The motion to amend the order is denied.

2. The motion for stay is granted and defendant, S.I.M.A. is given an additional twenty days from the date specified in the order of this Court of November 5, 1970, to file its answer and grounds of defense to the complaint.

/s/ Oren R. Lewis
United States District Judge

November 27, 1970

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 15,383

SOCIETE INDUSTRIES MECHANIQUES ALLIES,

Petitioner,

versus

HONORABLE OREN R. LEWIS, United States District Judge for the Eastern District of Virginia, Alexandria Division,

Respondent.

ORDER

The petition for a writ of mandamus and answer thereto having been read and considered, it is, with the concurrences of Judge Craven and Judge Butzner,

ORDERED, that said petition be, and it is hereby, denied.

For the Court:

/s/ Harrison L. Winter
United States Circuit Judge

January 18, 1971.

A True Copy, Teste:

Samuel W. Phillips, Clerk

By /s/ Virginia Lipford
Deputy Clerk